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Takings, Efficiency, and Distributive Justice: A Response to Professor Dagan

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TAKINGS, EFFICIENCY, AND DISTRIBUTIVE JUSTICE: A RESPONSE TO PROFESSOR DAGAN

Glynn S. Lunney, Jr.*

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In *A Critical Reexamination of the Takings Jurisprudence*,¹ I addressed an efficiency problem that arises when the government attempts to change property rights in a manner that burdens a very few for the benefit of the very many. Specifically, in the absence of compensation, the collective action advantage of the few in organizing to oppose the proposed measure will often give them a decided edge against the many. As a result of that advantage, the few will too often be able to persuade the legislature not to act, even when an objective evaluation of the proposal's costs and benefits would demonstrate the action's desirability. From this perspective, the risk of an overly narrow compensation requirement is not that the government will take too much, but too little. The government will forgo desirable projects because of political opposition from the uncompensated few. The solution I proposed was to interpret the Compensation Clause to require compensation to the few in such contests — a strict theory of singling

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1. 90 MICH. L. REV. 1892 (1992).

out if you will.² By doing so, we could reduce or, with full compensation, eliminate the few's opposition to the measure and thereby improve the legislature's ability both to evaluate the proposed action's merits and to go forward should action prove desirable.

In a recent article, Professor Dagan recognizes the efficiency implications of this public choice analysis, critiques some aspects of my proposed solution, and offers an alternative based on a principle he calls "progressive compensation."³ In his analysis, he attempts to inject an express distributive justice component into the compensation analysis, while at the same time solving the efficiency problem that public choice theory suggests. Although Professor Dagan's analysis reminds us of the important role the Compensation Clause plays in equalizing results between politically powerful and politically weak property owners, I believe that his critique is unpersuasive and that his proposed solution, while ambitious, will not work in the manner he suggests.

To address these points, Part I of this Response discusses the Compensation Clause's tendency to equalize results between the politically powerful and the politically weak and explains what I believe Professor Dagan is trying to achieve. Part I will focus on an initial case in which the government must choose between imposing a taking either on a group of relatively rich property owners or on a group of relatively poor property owners. Part II will explain why Professor Dagan's proposal is unlikely to achieve its efficiency and distributive justice goals in this initial case and will identify additional difficulties that would be presented if his proposal did work. Part III will then present a second case in which the government faces a choice, not between two different project sites, but whether to undertake a project at all. In this second case, Professor Dagan's proposal would appear to limit the availability of compensation when the project, if undertaken, would impose a taking on relatively rich property owners. As we shall see, however, such an approach to the compensation issue would likely frustrate the government's ability to move forward on desirable projects.⁴ For both of these cases, a uniform few-many approach with increased compensation generally for the few, would better address the goals of both efficiency and distributive justice. Part IV compares how Professor Dagan's progressive takings approach and my own uni-

2. *Id.* at 1954-55; see also Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 299, 307 (1992) (recognizing a similar public choice concern, but then proposing a test that defines as takings those regulations that are "functionally equivalent to a governmental land acquisition").

3. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999).

4. Moreover, the nature of the political process will likely lead to imperfect information about the need for compensation. As a result, the legislature will usually prove unable to mollify political opposition because of its inability to identify appropriate cases for the payment of compensation. See *infra* text accompanying notes 37-40.

form few-many approach would apply to the facts of *Penn Central*. Part V concludes by reflecting on the limitations of the Compensation Clause, and of the law in general, for inculcating the kinds of values espoused by Professor Dagan.

Before beginning the discussion, I should also mention two further points. First, I will restrict my analysis of Professor Dagan's proposal to a consideration of the role that distributive justice may serve within the context of the Compensation Clause. I suppose that most would readily agree that the Compensation Clause alone cannot serve as the principal means for achieving distributive justice, however defined. Government impositions on property are too random and sporadic to achieve the systematic redistribution of property that distributive justice may require. Second, I do not understand Professor Dagan's proposal as a mere precatory exhortation to planners and administrators to consider wealth in determining project placements. Rather, I understand his proposal as a call for specific changes in constitutional doctrine.⁵ Given that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"⁶ Professor Dagan's proposal is presumably directed at the judicial branch, requesting that they revise the present interpretation of the Compensation Clause in order to influence government decisions as to project siting. It may be that this judicial influence on siting decisions will become transparent once the legislative branch and associated administrative agencies have had the opportunity to internalize whatever compensation rules courts impose. But that should not mislead us. Judicial attempts to influence and to control government policy through constitutional interpretation necessarily entail judicial supervision over the other branches of government. We should therefore consider whether separation of powers would permit such judicial activism and, if so, whether the judiciary is the most appropriate branch of government for implementing policies of progressive compensation. With these points in mind, we can begin our analysis of Professor Dagan's proposal.

I. JUST COMPENSATION AS EQUALIZER

As compared to a no-compensation world, the Compensation Clause tends to equalize government-imposed burdens between politically powerful (and typically rich) property owners and politically weak (and typically poor) property owners.⁷ The example I use derives

5. See Dagan, *supra* note 3, at 768-90.

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

7. A correlation between wealth and political power will arise to the extent that the wealthy have better access to governmental decisionmakers, are more "like" the decisionmakers in class and race, or have more experience in dealing with the government. The wealthy may also have an advantage given the resources that they can devote to politicians who favor them. While both the wealthy and the poor alike have resources that they can de-

from a freeway planning case in Los Angeles.⁸ In the example, the government is considering whether to add: (1) another east-west freeway somewhat south of I-10 (i.e., running through Watts and other poor, typically African-American communities); or (2) a north-south freeway west of downtown (i.e., running through Beverly Hills). If the government must choose between these two projects, both planning considerations and political considerations will likely influence the government's decision. From a planning perspective, the government should select the project that generates more net benefit for a given cost, where benefits and costs are objectively determined by a freeway or planning department. This selection would be the "objectively better planning decision." Political factors, however, almost invariably influence such decisions. These political factors may influence the decisionmaking process subtly, by reshaping the government's perception of a project's costs and benefits, or more directly, by threatening the project itself (e.g. through a referendum) or the reelection of the project's proponents in the legislature.

If an interest group is better organized, more concentrated, more experienced at lobbying, or otherwise has improved access to the governmental decisionmakers (a "more effective group"), it will tend to have disproportionate political strength. For any given cost at risk or benefit available from proposed government action, such an interest group will prove relatively more persuasive in making the political case for its desired outcome than an interest group without these advantages (a "less effective interest group"). When the government must decide an issue pitting a more effective group against a less effective interest group, the difference in political effectiveness will tend to distort the planning decision.

In cases in which the government faces a choice between siting a project on a wealthy community or on a poor community, as in our freeway example, the government always seems to decide on another Watts freeway (almost without regard to an objective evaluation of the merits). The reason for this selection is simple: The present measure of "just" compensation does not fully compensate landowners for their losses;⁹ both groups of landowners therefore oppose the pro-

vote to political persuasion, not the least of which is their vote, the wealthy can more readily devote money (and access to others with money) to political causes. Given the costs of political campaigning, money will often prove more valuable to a politician seeking (re)election than the volunteer time, or even the votes, that the poor can offer.

8. This example is based loosely on the history of the Century Freeway (I-105) in the Los Angeles basin. See *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980); *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom. Keith v. Cal. Highway Comm'n*, 506 F.2d 696 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 908 (1975).

9. Compensation is not complete for two reasons. First, the measure of "just" compensation presently used does not compensate landowners fully for their losses. See Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 759-61 (1993). Second, some persons who experience losses do not receive compensation at all,

posed freeways in their respective neighborhoods, but the Beverly Hills contingent opposes more effectively than the Watts contingent. The poorer Watts landowners therefore lose the freeway placement battle.

This example suggests two distinct concerns that may arise from the interaction of politics and planning.¹⁰ First, to the extent that the Beverly Hills landowners are a more effective group politically, the Beverly Hills landowners may successfully persuade the government to place the freeway through Watts even though the Beverly Hills freeway is, from a planning perspective, more desirable. Political influences may thus lead to inefficient project placement. Second, if similar political pressures lead the government to site projects systematically in poor neighborhoods, relatively poor neighborhoods will host a disproportionate share of such government projects. Precisely to the extent that “just” compensation presently fails to compensate property owners fully for their losses, property owners who experience government takings are effectively subsidizing the government project. Disproportionate imposition of takings on poor neighborhoods therefore creates a regressive tax that raises distributive justice concerns.

The Compensation Clause, as presently interpreted, addresses both of these concerns to some extent. At the very least, it ensures some compensation — “fair market value” — for property owners

either because the nature of the loss does not qualify as a taking (i.e., a neighbor whose land is not physically taken or encroached upon, but who now has a freeway right next to her house) or because the loss is not to a property interest (i.e., an apartment dweller with an at-will rental agreement).

10. In his reply essay, Professor Dagan notes that I have not addressed his moral hazard argument that full compensation may lead landowners to overinvest in their property confident of receiving compensation in the event of a government taking. Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 501, 504 & n.9 (2000). In this regard, his analysis builds on the work of William Fischel and Perry Shapiro, who originally suggested that, at least as a theoretical matter, full compensation may create some degree of moral hazard. William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269, 272-74 (1988) (comparing the moral hazard that would allegedly be created by full compensation under the Compensation Clause to the moral hazards created by fire insurance, payments to the victims of pollution, and tenure for law professors). Neither Fischel and Shapiro, nor Professor Dagan offer any evidence, whether empirical, anecdotal, or otherwise, that this theoretical concern actually affects the way people behave in this area, and I have suggested elsewhere reasons why the supposed moral hazard will not arise. Lunney, *supra* note 9, at 767-68. In any event, to whatever trivial degree full compensation may create a moral hazard, suggesting that the practical consequences of this moral hazard are as significant as those that arise from powerful interest groups blocking desirable government action, as Professor Dagan implicitly does, is simply not credible.

As for the personality theories of property that Professor Dagan relies upon, I do not address them because I find them incoherent. They rely on a supposed consensus regarding property ownership that does not exist at a sufficiently concrete level to prove helpful. See generally Stephen J. Schnably, *Property and Personhood: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 352-54, 361-79 (1993).

who experience a taking.¹¹ Although fair market value is incomplete compensation (because it fails to include subjective valuations), it is a substantial improvement over no compensation. In a no-compensation world, the politically less powerful would still bear a disproportionate share of government-imposed burdens, but without any compensation at all.

Professor Dagan is understandably not satisfied with this unequal equality. He desires a compensation regime that would achieve something closer to true equality between rich and poor property owners. He uses the phrase "progressive compensation" to describe his proposed solution and, as the phrase suggests, the concept is to compensate more readily or at a higher level the less-wealthy property owners.¹² Such an approach compensates the poor property owners more generously when they experience government-imposed burdens, and thereby addresses the distributive justice concern. Professor Dagan also claims, however, that his approach will lead the government to impose burdens more efficiently at the outset and thereby resolve the inefficient project placement concern. Specifically, by requiring the government to pay relatively more to the Watts landowners in our example, Professor Dagan apparently hopes to create a budgetary pressure (by increasing the relative cost of the Watts freeway) that will neutralize the lobbying pressure of the politically more powerful Beverly Hills contingent.¹³ With equal pressure from both sides, the Planning Department will be free to make the objectively better planning decision and will impose the taking on the richer landowners when planning considerations so dictate.¹⁴ I do not believe, however, that Professor Dagan's proposed solution will solve the efficiency

11. Applying "fair market value" as the proper measure of just compensation represents something of an oxymoron because market value presupposes a willing seller, while eminent domain is a forced sale.

12. Professor Dagan's actual implementation of the concept is fairly limited, emphasizing a balance between long-term reciprocity of advantage and the extent of the immediate disproportionate financial loss imposed, in determining whether to award compensation at all. Dagan, *supra* note 3, at 768-90. For our purposes, it does not really matter whether we create a relative difference in compensation levels through a refusal to compensate altogether in certain cases, a change in the amount of compensation awarded, or a combination of both approaches. For now, we will assume that courts will implement progressive compensation through a combination of both approaches because that allows more flexibility in tailoring relative compensation levels, compared to the blunt tool of refusing to award compensation.

13. *Id.* at 754 ("A progressive compensation rule tends to ensure that the placing issue will be resolved according to planning considerations since it balances the relative pressures of strong and weak landowners.").

14. This is not the only possible result. Public choice research suggests that given strong support and opposition to a measure, the government may choose to defer or avoid altogether a decision. See William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288-90 (1988).

problem, and, even if it did, I would worry that achieving a balance in such a way would prove undesirable.

II. A CRITIQUE OF PROFESSOR DAGAN'S PROPOSAL

A. *Does Progressive Compensation Achieve the Desired Counterbalance?*

Project sitings in a representative democracy are inevitably part planning and part political. Our first concern is that political influence may improperly skew the planning decision and lead to an inefficient project siting. We therefore begin our evaluation of Professor Dagan's proposal by examining how progressive compensation would affect the political aspect of siting decisions. In our freeway example, the concept of progressive compensation would require the government, if it builds the freeway, to pay the Watts landowners somewhat more than under current rules and/or pay the Beverly Hills landowners somewhat less. Professor Dagan believes that adopting such a compensation rule would make it more likely that the government would place the freeway in Beverly Hills. To evaluate Professor Dagan's position, we need some sense for how the government makes decisions.

Traditionally in discussing the Compensation Clause, courts and commentators have treated the government like a private actor.¹⁵ From this perspective, any increase in the scope of the compensation requirement would increase the cost of government action and reduce what the government can achieve with the resources available, just as increased prices would decrease a private actor's spending power. At the same time, the risk from too narrow a compensation requirement is that the government would take too much, just as a private individual would take too much if she did not have to pay. Given this perspective, liberal members of the Court have generally preferred to restrict the reach of the Compensation Clause in order to allow the government more room to advance public welfare.¹⁶ Conservative members of the Court, on the other hand, have preferred a somewhat broader interpretation of the Compensation Clause to rein in potential governmental excesses.¹⁷

15. See, e.g., Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999). The private actor-political actor dichotomy parallels a similar analysis that Professor Daryl J. Levinson has recently presented. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-51 (2000).

16. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 133-35 & n.30 (1978).

17. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992) ("On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use — typically, as here, by requiring land to be left substantially in its natural

Yet the government is not a private actor. It is a political actor and is subject to ever-present political constraints. Elected officials and those they appoint cannot simply take any property they like, even if compensation were not required. They must consider the consequences of their actions, both on their constituents and on their continued tenure in office. To impose regulatory burdens on property owners, elected officials must deal with the political opposition of those individuals whose property will be affected. And if they take too much without paying, elected officials will face the consequences in the next election.

When we recognize this distinction between political and private actors, we find that a broader interpretation of the Compensation Clause may facilitate, rather than limit, the government's ability to advance the public welfare. As a political actor, the government, when it evaluates the costs and benefits of a proposed project, is not acting simply for itself, as a private actor might, but rather as the representative of all those owners affected by the measure. As a result, the government should consider costs imposed even if not borne by the government directly and should consider benefits generated even if not received directly by the government. In an ideal world, the government would have perfect information as to the costs and benefits of each proposal, would fully and objectively evaluate each and every proposal's merits, and would act accordingly.¹⁸ As part of this process, the government would also determine the need for and pay compensation when appropriate and desirable. In such an ideal world, a constitutional requirement of compensation would prove superfluous and would not influence governmental action or decisionmaking.

Yet our world is not quite so ideal. In the absence of perfect information and in the presence of political influence, a constitutional compensation requirement can strongly affect and significantly improve governmental decisionmaking. If the government seeks to balance the interests of competing constituencies, as the political actor model maintains, paying compensation can improve the ability of the government both to identify and to move forward on desirable projects. Specifically, if courts were to interpret the Constitution to require

state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”).

18. This model is an idealized form of the social choice account of government, in which the government is an organic entity that always seeks to act in the best interest of society as a whole. In contrast to the social choice account, the public choice perspective sees the government as a group of individuals, including elected officials, bureaucrats, and administrators, each attempting to maximize his or her own welfare. Under the public choice perspective, elected officials may seek to maximize their chances of re-election, while administrators may seek to maximize the power and prestige of their positions. It remains possible under the public choice perspective that the government may act in the best interest of society as a whole, but it will do so only when that public interest happens to coincide with the private interests of the government officials making the decision.

compensation whenever the government takes property from the very few to benefit the very many, it would redistribute losses from small, concentrated groups of property owners to taxpayers generally. Although not universally true, a small, concentrated group will generally prove more effective politically than a large, dispersed group such as taxpayers. By compensating the more effective group, we can substantially reduce its reason for opposing proposed government action. As the more effective group is placated, its undue political influence becomes less likely to skew the government's picture of the relative merits of the alternative project sitings.

Compensation should therefore ensure a more accurate determination of the proposed action's desirability. In addition, by switching the loss from a more effective group to a less effective group, requiring compensation can also substantially reduce the net political opposition facing a proposed government action.¹⁹ Reduced political opposition should make it easier for the government to move forward with desirable projects. Thus, rather than restrict the government's ability to act, as the private actor model would suggest, requiring compensation can improve the government's ability to act and to act appropriately.

If we apply the political actor model of government to Professor Dagan's proposal, it seems implausible that progressive compensation would increase the likelihood that the freeway would go through Beverly Hills rather than Watts. In terms of first order effects on the parties most directly involved (i.e., the landowners), adopting a progressive compensation scheme would have two effects. First, as you reduce the (relative) compensation to the Beverly Hills landowners, their opposition to the Beverly Hills freeway would likely grow stronger and even more strident.²⁰ Second, as you pay more to the Watts landowners, their opposition to the Watts freeway would be re-

19. See Lunney, *supra* note 1, at 1955-59.

20. Even if we implemented progressive compensation by increasing the absolute level of compensation to the Watts landowners, while keeping the absolute level of compensation to the Beverly Hills landowners the same as under current rules, progressive compensation would still generate more strenuous opposition by the Beverly Hills contingent. Although they would be receiving absolutely the same level of compensation under either regime, the Beverly Hills contingent would still have more to complain about because they would not be receiving as much as the Watts landowners would have. The perception of unfairness generated by the unequal compensation levels would lead the Beverly Hills contingent to demand "equal" (and hence fair) compensation. In his reply essay, Professor Dagan contends that Beverly Hills landowners will accede to the justice of his proposed progressive compensation regime, and so not object to the perceived unfairness of (and indeed will not perceive as unfair) more extensive compensation for less well-off landowners. Dagan, *supra* note 10, at 511-12. Alternatively, even if Beverly Hills landowners protest the unfairness of progressive compensation, Professor Dagan asserts as a fallback position that any such complaints will carry little weight given the obvious desirability of his proposed progressive compensation scheme. *Id.* These views are unrealistic. If accurate, Professor Dagan's reasoning would suggest that high-income taxpayers would have come to accept a strongly progressive income-tax structure (or at least their arguments against such a structure would carry little weight). Yet, that has not happened.

duced. Given increased opposition to the Beverly Hills freeway and decreased opposition to the Watts freeway, it would appear that progressive compensation will result in a Watts freeway, not a Beverly Hills freeway as Professor Dagan anticipates.

But the landowners are not the only ones that would be affected by a shift to a progressive compensation scheme in the freeway siting case. Increased compensation to the Watts landowners may also generate second-order effects on parties concerned generally with the amount and nature of government expenditures.²¹ Taxpayers and other groups competing for government funding, for example, may increasingly oppose the Watts freeway as its price tag increases. For Professor Dagan's proposal to solve the efficiency concern, he must establish that net opposition to a project will increase as compensation levels increase. This he has not done, but has merely assumed. From the political actor perspective, progressive compensation will lead to an increase in net opposition only if the "budget-concerned" groups, which are increasingly opposed to a project placement as compensation levels increase, are more effective politically than the group of landowners increasingly pacified as compensation levels increase. But this condition will not usually be satisfied. These budget-concerned groups are unlikely to prove more effective politically in the freeway placement battle because they are only indirectly affected by the higher freeway cost that progressive compensation may generate. Taxpayers, for example, may be generally concerned about higher taxes, but government takings are unlikely to represent such a large share of the government's budget that taxpayers will take a particular interest in them. Similarly, those competing for the government funds may incidentally worry about an increase in the price of the Watts freeway, but their central focus is on persuading the government to adopt their desired program. The freeway projects may be only one of many potential competitors.

In contrast, the Watts and Beverly Hills landowners are directly affected by both the freeway placement and the relative levels of compensation available. Although we have identified the Watts contingent as politically weak, the truth is that they are politically weak only relative to the Beverly Hills landowners. The Watts contingent is likely to face relatively low transaction costs in organizing to oppose the Watts freeway, at least compared to the transaction costs facing taxpayers generally. They are also likely to have several elected representatives for whom the Watts freeway placement will be a central political issue.

21. So long as some compensation is required, these budget-concerned groups may oppose both freeway projects. But to analyze how progressive compensation would affect the political equation, we need to focus on marginal effects and determine how a shift to a progressive compensation system would increase or decrease political opposition to a given project compared to the present compensation system.

As a result, for any given compensation level, the Watts landowners are likely to prove more effective at opposing the Watts freeway than the budget-concerned groups with which Professor Dagan proposes to replace them.²² Increasing compensation to the Watts landowners therefore will not reduce any imbalance in political influence between Watts and Beverly Hills landowners, and may indeed exacerbate it.

If we tried to force (effectively) a choice of the Beverly Hills freeway through progressive compensation, the likely result would be no freeway at all. For example, over the short term, the government may face a budgetary constraint for the freeway project selected. Given that budgetary constraint, we could find and adopt a compensation rule sufficiently progressive so that only the Beverly Hills freeway might be affordable. In such a case, a progressive compensation scheme might appear a viable way to force the Beverly Hills freeway through. But the more likely political result would be that neither freeway would get built — the Watts freeway because it was no longer affordable and the Beverly Hills freeway because it would not be politically viable.²³

That Professor Dagan's desired balance is unlikely to work in the Los Angeles freeway case does not, of course, mean that it would never work. There might well be cases in which adopting a progressive compensation scheme could lead the government both to select land owned by the politically powerful group and to impose the project

22. In the actual case, the government(s) promised far more extensive efforts to mitigate the consequences of the freeway's placement than the Compensation Clause would strictly require. See, e.g., *Keith v. Volpe*, 501 F. Supp. 403, 405, 409-10 (C.D. Cal. 1980); William Trombley & Ray Hebert, *Bold Housing Program Develops Big Problems: Plan Plagued by Shoddy Construction, Cost Overruns, High Vacancy Rates, Opposition*, L.A. TIMES, Dec. 28, 1987, pt. 1, at 1. Under Professor Dagan's reasoning, the increased cost associated with these mitigation measures should have increased effective opposition to the project (i.e., increased opposition from budget-concerned groups should have outweighed decreased opposition from affected landowners). But these measures made the freeway possible, suggesting that the affected landowners were far more influential in the process than the budget-concerned groups.

23. Such a compensation rule would essentially convert the government's decision from a choice between two project placements, Watts or Beverly Hills, into a decision as to whether or not to proceed with the Beverly Hills freeway alone. Although freeway users would likely support the Beverly Hills freeway, they are likely to prove less effective politically than the Beverly Hills landowners. As compared to the Beverly Hills landowners, freeway users are extremely diffuse and would likely face considerable transaction costs and free-rider problems in attempting to organize political support for the freeway. As a result, persuading the government to build the Beverly Hills freeway will prove difficult politically, unless the Beverly Hills landowners receive near-complete compensation for their losses. With near-complete compensation, the unbalanced political contest between the smaller, more cohesive, and therefore more effective Beverly Hills landowners and the diffuse, largely unrelated, and therefore less effective freeway users is converted into a more balanced political battle between diffuse taxpayers and diffuse freeway users. See Lunney, *supra* note 1, at 263-64; see also text accompanying notes 37-41 *infra* (discussing more generally the build-or-not-build case).

over that group's objections.²⁴ But such cases will likely prove the exception rather than the rule and arise only when the governmental decisionmaker is sufficiently insulated from political pressure to behave more like a private actor.²⁵

If we truly want the Planning Department to make a decision unbiased by political influences, increasing compensation to both groups to a level closer to their true losses would be a simpler and more appropriate avenue. As we increase compensation, we decrease the central reason for each landowning group's opposition to the freeway's placement.²⁶ Although we may never be able to compensate property owners fully for their losses, particularly for the subjective losses associated with the loss of residential neighborhoods, increased compensation should tend to quiet the opposition from these two groups. As these two groups are pacified, the Planning Department will be increasingly able to adopt the efficient, rather than the politically expedient, solution.

Increased compensation to both groups would enable the Planning Department to compare the benefits and costs of each freeway unbiased by political influences.²⁷ Moreover, such an approach would tend to address Professor Dagan's distributive justice concerns as well. "Full" compensation would eliminate the subsidy that property owners effectively provide when the government takes their land. As a result, even if poor neighborhoods continued to bear a disproportionate share of government takings, funding for such projects would shift away from the property owners themselves to the taxpayers who fund the increased compensation payment. To the extent that the funds for the increased compensation were raised through a progressive tax system, the rich would pay for a larger share of government projects than under the present compensation system.

24. Even if we could, in theory, identify a progressive compensation level that would lead to a balance between the Beverly Hills landowners and the budget-concerned groups, it would not be enough for Professor Dagan's balance to work. For the balance to work, the outcome of the likely compensation decisions *ex post* must be sufficiently clear to the relevant interest groups *ex ante* so that they can modulate their support or opposition for the two alternatives appropriately.

25. The military's acquisition of land may fall within this category, as Professor Joseph Sax has suggested. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-63 (1964) (arguing that compensation should be required when the government acts as enterprise but not as arbitrator).

26. I would define "just" compensation as that level of compensation that made the landowners indifferent between accepting the payment and the loss they experienced. Compare Dagan, *supra* note 3, at 755 & n.36, with Lunney, *supra* note 9, at 757-69.

27. One interesting twist with road construction is that road construction has built-in interest group support, in the form of road contractors. Their support for road construction (of any sort) may bias the Planning Department to build more roads than are strictly desirable. We might therefore adopt a partial compensation rule so that landowners will remain somewhat opposed to having their land taken for road construction in order to counterbalance the road contractor's pro-road influence.

In addition, a uniform few-many rule with increased compensation better serves the goals of distributive justice generally. Specifically, it addresses not only issues of distributive justice as between individuals at different ends of the socioeconomic spectrum ("vertical equity"), it also ensures horizontal equity between comparably wealthy individuals. Because a progressive tax system is likely to impose comparable tax burdens on comparably wealthy individuals, relying on a progressive tax system to address the vertical equity issue tends to ensure that comparably wealthy individuals contribute comparably to the distributive justice effort. In contrast, Professor Dagan's proposal would leave those "wealthy" individuals who happen to experience a government taking to bear a disproportionate share of the distributive justice burden compared to other comparably wealthy individuals who do not experience a taking.

A uniform few-many rule, with increased compensation levels for the few in all cases, would therefore tend to address both the efficiency concern and the distributive justice concern that we have identified. Professor Dagan's progressive compensation scheme appears unable to achieve both of these results.

B. *Assuming They Arise, Are the Budgetary Pressures Created by Progressive Compensation Desirable?*

Even if progressive compensation could lead to budgetary pressures that would place projects on the lands of the politically powerful, difficulties would arise. Using progressive compensation to force the government's hand fundamentally ignores the fact that political power sometimes coincides with social welfare. Obviously, when outcomes happen to coincide with race and wealth in certain ways, there is good reason to be skeptical as to whether any given outcome necessarily represented an unbiased balancing of objective planning considerations.²⁸ Progressive compensation, however, appears too blunt a tool to separate those project placements that resulted from improper bias from those that properly balanced the costs and benefits at issue. It simply increases the price tag for one site selection relative to another. The resulting budgetary pressures may lead the government to impose takings on a more wealthy, rather than a less wealthy, constituency in

28. For example, in the Watts freeway case, part of the reason the freeway ended up going through Watts was that the Watts path passed through areas with a mixture of residential, industrial, and commercial uses. Many of the commercial and industrial Watts landowners actually supported the Watts freeway path, substantially undermining the uniformity of the Watts landowners' opposition. See William Trombley & Ray Hebert, *Road Paved with Good Intentions*, L.A. TIMES, Dec. 27, 1987, pt. 1, at 30.

any given case, but it does so seemingly without regard to the relative planning merits of the two sites.²⁹

We might be able to avoid this difficulty if we could readily determine the efficient project placement in each case, by simply awarding progressive compensation when that would lead to the proper decision. But such an approach would essentially require a court to identify the appropriate project placement and then, when necessary, force its decision (through progressive compensation) on the relevant legislative or administrative body. Such judicial second-guessing will not be easily accepted in this post-*Lochner* era. Alternatively, if we could easily separate the illegitimate sources of the more affluent group's political power from the legitimate,³⁰ we could award progressive compensation in those cases in which it appeared that the illegitimate political power was driving (or would, but for progressive compensation, drive) the project placement decision. But separating legitimate from illegitimate political power does not appear to be a noticeably

29. If we assume, for example, that the government behaves like a private actor in a particular case, then the government will respond only to that portion of the project's true cost that the government itself must bear. Let us further assume that the government must choose between two project placements, A and B. Both placements generate comparable benefits to the public, but the true cost of the A placement is somewhat higher (10%) than the true cost of the B placement. Given this distribution of costs and benefits, selecting the B placement represents the efficient or planning-based decision. Under the present system of uniform compensation, the government will likely bear only a fraction of each placement's true cost (perhaps 70% of the true cost), but the fraction is likely to be the same for each placement. For that reason, while the government (if behaving like a private actor) will underestimate the cost of each placement, it will underestimate them to the same extent. The B placement will continue to appear less expensive (as it is), and the government will select the B placement. However, if courts following Professor Dagan's approach require a difference in compensation levels for these two placements, and as it turns out, progressive compensation requires a higher compensation level (perhaps 85% of true cost) for the B placement than for the A placement (remains at 70%), then progressive compensation creates a differential between each placement's true cost and the apparent or perceived cost on which the government will make its decision. Under these assumptions, progressive compensation would lead the government to select the inefficient A placement. Thus, progressive compensation may not solve, and may in fact create, inefficiency in project placement decisions. Whether distributive justice concerns might outweigh efficiency concerns and so justify such a result is a separate issue. See *infra* the discussion in Section II.C, text accompanying notes 30-32.

30. I use the terms legitimate and illegitimate power, not to distinguish between legal (i.e., campaign contributions) and illegal (i.e., bribery) uses of political power, but to separate political power that coincides with the underlying merits of proposed government action from political power that does not. If a group has greater political strength because the extent of its losses from government action are in fact larger, that increased strength reflects an increase in the cost of the proposed government action. Such a source of political power is legitimate because it helps the government more accurately determine the proposed action's underlying merits. If a group has greater political strength because it is better organized or has better access to the governmental decisionmakers, however, its increased strength does not reflect any increase in the underlying costs or benefits of the proposed action. Because these sources of political power lack a direct connection to the measure's underlying merits, these sources of political power are illegitimate in the sense that they can mislead the government as to the true desirability of the proposed action.

easier task for a court than does determining a project's proper placement.

If courts are unable to identify in practice those particular cases in which progressive compensation would improve the efficiency of the planning process, the grave risk is that they will adopt some uniformly progressive compensation scheme. If that scheme were to lead to the budgetary pressures that Professor Dagan articulates, progressive compensation will press the government to impose takings more often on affluent communities by making the alternative of burdening the less-affluent community more expensive. But the higher price tag will in no way reflect any objective planning merit. As a result, if it works at all, progressive compensation would introduce an artificial bias into siting decisions that would inevitably lead to cases in which the government takes from a more affluent group of landowners, even though planning considerations would dictate otherwise.

C. Distributive Justice and Lochner's Shadow

If we look at project-siting decisions in terms of distributive justice and efficiency concerns more generally, we can identify three paradigm cases:

- Case 1: Distributive justice and efficiency both favor siting the project on the land of the more affluent.
- Case 2: Distributive justice favors siting the project on the land of the more affluent; efficiency favors siting the project on the land of the less affluent. The distributive justice concern outweighs the efficiency concern.
- Case 3: Distributive justice favors siting the project on the land of the more affluent; efficiency favors siting the project on the land of the less affluent. The efficiency concern outweighs the distributive justice concern.³¹

In considering these three cases, there are two levels of analysis we must keep in mind. At the first level of analysis, we must determine how each of these cases should be resolved and whether we can define a workable compensation rule that will push the government toward that proper resolution. At this level, Professor Dagan's approach appears to gloss over the possibility that distributive justice and efficiency may suggest different answers. As a result, Professor Dagan

31. In theory, there are also paradigm cases in which distributive justice would favor siting the project on the land of the less affluent. In practice, however, such cases would be extremely rare. The reason is that landowners affected by a project siting are typically only partially compensated. Consequently, the affected landowners subsidize the project. But distributive justice would rarely require the less affluent to subsidize public goods. Only if the less affluent landowners were to be compensated at or above full compensation would distributive justice entertain the possibility of siting a project on their land.

fails to offer any means to distinguish Case 2 from Case 3. In addition, as discussed above, the budgetary pressures that Professor Dagan hopes to create through progressive compensation may prove insufficient to ensure proper project siting in Case 1.

At the second level of analysis, we must determine who should decide into which of these three categories any given siting decision properly falls. At this level, Professor Dagan's analysis runs sharply counter to recent trends in constitutional doctrine by shifting a considerable degree of decisionmaking authority from the executive and legislative branches to the judicial.³² Moreover, this shift rests on a concept — distributive justice — that seems among the least susceptible to judicial resolution through specific rules or principles. Even if distributive justice enjoys widely shared recognition at some general level, application of distributive justice principles to specific cases are likely to prove troublesome. The relationships between wealth, reciprocal benefit, and social responsibility implicated by distributive justice raise questions of degree that seem necessarily to call for resolution by elected officials rather than appointed judges. Although he avoids stating the proposition directly, Professor Dagan's analysis implicitly suggests that wealth should be a suspect classification justifying heightened judicial scrutiny. The Court has directly rejected such a proposition, however, not only because the legislature has shown itself capable of acting on behalf of the poor, but also because recognizing

32. It would not exaggerate the point to say that the central, driving force behind current takings doctrine is the desire to create as clear a separation as possible between economic regulations, on which near-absolute judicial deference is required, and takings of property, for which the Constitution mandates compensation. Part of the reason it remains convenient to pretend that *Pennsylvania Coal Co. v. Mahon* was the first "regulatory takings" case is that it facilitates this separation far better than the railroad rate regulation cases that were, in fact, the first. Compare Heller & Krier, *supra* note 15, at 1005 ("Under the conventional view, analysis of cases arising from such [regulatory] programs would no doubt begin (and quickly end) with Justice Holmes's opinion for the Court in *Pennsylvania Coal Co. v. Mahon*."), with Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 670-71 (1996) ("*Mahon* is now widely understood, by Supreme Court Justices and academic commentators alike, to be a landmark: the first 'regulatory takings' case. This honor is ambiguous; but under any of the principal resolutions of the ambiguities, *Mahon* does not deserve it."). For the railroad rate regulation cases, see, e.g., *Smyth v. Ames*, 169 U.S. 466, 546 (1898) ("But it is equally true that the corporation performing such services . . . may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."); *Railroad Comm'n Cases*, 116 U.S. 307, 331 (1886):

From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.

wealth as a suspect classification would inevitably lead to judicial intervention on a scale not seen since *Lochner*.³³

Although Professor Dagan attempts to finesse the *Lochner*-ism issue inherent in his proposal,³⁴ I do not believe that the issue can be dismissed so readily. While *Lochner* is always raised against proposals for expanding (or restoring) the reach of the Compensation Clause, the *Lochner*-ism charge carries more weight in connection with Professor Dagan's proposal because his proposal is neither tied closely to the literal language of the Constitution nor to recognized process failures in governmental decisionmaking.³⁵ There is simply no hiding the fact that Professor Dagan is expressly inviting courts to second-guess the legislative and executive branches on the issue of distributive justice.³⁶ Because he is urging courts to intervene on behalf of the poor and less fortunate, Professor Dagan's analysis necessarily generates more sympathy than the Court's *Lochner*-era interventions, which often seemed to reflect the opposite distributive bias. But whatever sympathy his approach may initially generate, his proposal raises the same judicial competence concerns and is objectionable for the same reasons as is *Lochner* itself.

33. The Court first rejected wealth as a suspect classification in *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970), and has steadily maintained that position in the face of a variety of challenges. See *Harris v. McRae*, 448 U.S. 297, 323 (1980); *Maier v. Roe*, 432 U.S. 464, 470-71 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam); *James v. Valtierra*, 402 U.S. 137 (1971).

34. Professor Dagan takes two tacks in limiting the implementation of the distributive justice principle in order to avoid *Lochner*'s shadow. First, he focuses his analysis on land, as if the Takings Clause applied only to government regulations of land use, rather than to property rights more generally. Second, he implements the distributive justice concerns through existing elements of takings doctrine, reciprocity of advantage, and diminution of value. See *infra* text accompanying note 42.

35. In rejecting the *Lochner* approach, the Court in *United States v. Carolene Prods. Co.* identified three circumstances in which heightened judicial scrutiny might remain appropriate. In footnote 4, the Court explained:

There may be narrower scope for . . . the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . [when it] restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [or when it is] directed at particular religious, or national, or racial minorities.

304 U.S. 144, 152-53 n.4 (1938).

36. Professor Dagan's suggestion in his reply essay that a Fifth Amendment claim should be available if injured smokers are deprived of their right to sue pursuant to the tobacco settlement only heightens my concern in this regard. See also Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 406-16 (2000).

III. COMPLETING THE EFFICIENCY PICTURE: COMPENSATING THE POLITICALLY POWERFUL

So far, we have addressed the takings case that Professor Dagan posits, in which the government faces a choice between two project sitings. Even if his proposal were to function properly in that context, Professor Dagan fails to address the efficiency concerns that arise when the government must choose between acting, and thereby imposing a cost on a powerful interest group, and not acting at all.³⁷ In such cases, Professor Dagan's hoped-for political counterbalance could not arise. Lacking two groups of landowners on whom the government could impose the burden, courts cannot establish compensation rules that would adjust the relative compensation levels between two groups to ensure a planning-based decision. Yet the powerful interest group could still block desirable government action.

Professor Dagan addresses such cases in part by arguing that we need not compensate politically powerful interest groups as readily, because their political power will enable them to extract compensation through the give-and-take of the legislative process.³⁸ Although Professor Dagan is careful to limit his assumption of legislative in-kind compensation to cases in which a powerful interest group loses a regulatory or placement battle, others have asserted more broadly that legislative in-kind compensation will fully redress the risk that a powerful interest group will successfully block otherwise desirable government action.³⁹

This theory of legislative in-kind compensation has never seemed persuasive to me. The argument that we need not compensate powerful interest groups rests on the assumption that powerful interest groups can readily convert their political power to block a measure into power to extract compensation with little loss in their political leverage. Yet, this assumption neglects the fact that political power is usually contextual and therefore inherently dependent on the position one is taking. Thus, an interest group may have effective arguments (and therefore substantial political power) to oppose a government action on the merits, but those arguments might lose their persuasive force if the group were to switch from opposition to acquiescence on the condition of payment. More generally, the notion that an interest group can readily switch from principled opposition to attempted extortion with little loss in associated political power is relatively implau-

37. Both *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), two of the three examples that Professor Dagan discusses, represent such an on-off choice.

38. Dagan, *supra* note 3, at 754; see also Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 308-11 (1990).

39. See, e.g., Levmore, *supra* note 38, at 310-11.

sible, whatever attempts are made to hide or finesse the switch. Opportunities for legislative in-kind compensation will undoubtedly arise in some cases, but we should not accept as a general rule the suggestion that legislative in-kind compensation is readily available to politically powerful groups.

Moreover, opportunities to extract in-kind compensation will most likely arise when the powerful interest group is likely to lose on an issue. In such a case, the group can work pragmatically for in-kind compensation as a second-best alternative to blocking the proposed regulation or taking. But when the powerful interest group is likely to win and successfully block the proposed action, there is less reason for the group to accept a carry-over token of uncertain value to abandon its position. Even if a large enough carry-over token would persuade the group, the government actor is unlikely to offer it. When the interest group can persuade the government that the proposed action is undesirable, the government, by definition, views the proposed action as a net social loser. Because the government perceives the proposal as a net social loser, the government has no reason to offer a carry-over token to secure the proposal's enactment. The government has been persuaded not to act, and there is simply no room for an effective log-rolling bargain to be struck.⁴⁰

In such cases, the legislature may offer to compromise, successively watering down a measure until it finds a version acceptable to the concentrated interest group. But this is not a solution to the public choice problem, merely an admission of it. Eliminating or limiting the amount of compensation in such cases would leave the government to accept what it can get in the face of the interest group's opposition — an approach that inevitably means too little government action too late. The government's ability to deliver public goods would be sharply limited.

An up-front promise of compensation, on the other hand, can substantially overcome this public choice problem. Such a promise substantially reduces the interest group's likely opposition, gives the government a more accurate picture of the measure's desirability, and

40. If the government actor can see through the interest group-created appearance of undesirability (and it probably can in some cases), then we are not dealing with a case in which the interest group is likely to win in any event. In addition, if the government can routinely see through interest group-created appearances, then the public choice view of government is simply not worth worrying about and we should stick with the social choice account. For definitions of the two models of government, see *supra* note 18. But Professor Dagan has agreed that concentrated interest groups can block desirable government action. It therefore seems that the logical corollary is that they do so by creating the appearance that the action is socially undesirable (a net loser), and by persuading the government actor to accept this appearance as true. Given that assumption, we cannot also assume that the government actor can nevertheless step outside of itself, perceive that the measure is in fact desirable, and offer appropriate carry-over compensation in order to ensure the measure's passage.

leaves the government substantially more free to act on behalf of the social welfare. It is no coincidence that we have relatively less government action on issues such as pollution control, wetlands protection, and beachfront preservation, in which the courts have refused to require compensation, and relatively more government action on issues such as the acquisition of military equipment and road-building, in which the courts have required compensation.

Although Professor Dagan worries that public choice theory may lead to a regressive compensation system,⁴¹ in which the politically powerful receive compensation but the politically weak do not, this is not a necessary conclusion of the public choice analysis. Limiting compensation to cases in which the interest group would have blocked government action but for the promise of compensation would substantially complicate the takings inquiry and inject considerable uncertainty into the compensation issue. If we are to persuade concentrated interest groups to forego use of their lobbying advantages in few-many contests, the promise of compensation must be clear. For that reason (and, I admit, because of distributive justice concerns similar to those Professor Dagan articulates), I prefer an interpretation of the Takings Clause that focuses almost exclusively on whether the government has acted in a manner to deprive the very few of a property interest for the sake of the very many. Whatever marginal efficiency gains we might garner by more perfectly tailoring the rule to the identified public choice problem would be outweighed by the uncertainty that a less clear compensation promise would create. Further, combining a uniform few-many rule with increased compensation levels paid for through progressive taxation would address Professor Dagan's distributive justice concerns as well.

IV. AN EXAMPLE: *PENN CENTRAL*

Professor Dagan proposes three prerequisites to an award of progressive compensation: (1) the property owner is disproportionately burdened by the government action; (2) the burden is not offset or likely to be offset by long-term reciprocal benefits; and (3) the property owner is politically powerless.⁴² Although Professor Dagan refers to cases in which his proposal would justify increased compensation compared to present doctrine,⁴³ he unfortunately applies his proposal to three cases in which it generates the same results as present takings

41. Dagan, *supra* note 3, at 753-54, 788.

42. *Id.* at 765.

43. *Id.* at 798 (suggesting that compensation would be required when government regulation "prohibits many uses of [a person's] land in order to preserve endangered species").

doctrine.⁴⁴ Analysis of his proposal is therefore difficult, but we can obtain some useful insights by comparing his proposal and my own in the context of *Penn Central Transportation Co. v. New York City*.⁴⁵ On one hand, *Penn Central* represents the type of case in which Dagan's analysis should prove most persuasive. The City imposes limitations on the property rights of a rich, politically powerful company.⁴⁶ In addition, there is at least a plausible argument that the company receives extensive reciprocal benefits both from this specific government action and from government action more generally.⁴⁷ On the other hand, this case represents an example in which my analysis should prove least persuasive. Despite its lobbying advantages, *Penn Central* was unsuccessful in its efforts to block desirable government action. Yet, even in this case, I believe that there is a compelling case for compensation.

Let us assume that the restrictions on *Penn Central*'s development rights are socially desirable and we must decide *ex ante* whether compensation will be required if the restrictions are adopted. One way to resolve whether *Penn Central* should be compensated is to determine whether it is less expensive for society to pay for the restriction by compensating *Penn Central* or for *Penn Central* alone to bear the cost of the restriction. Since, in either event, the development value associated with the airspace above the terminal is lost, we can disregard this cost. Awarding compensation changes the party within society on whom this cost falls, but so long as compensation accurately reflects the lost development value, awarding compensation neither increases nor decreases this cost for society as a whole.⁴⁸

In the case in which *Penn Central* is compensated at full value, the only costs associated with awarding compensation are the transaction costs of measuring, collecting, and transferring the requisite sum. These transaction costs would not arise were we to refuse compensation to *Penn Central*.

44. *Id.* at 792-801. I would also note that I was surprised by Professor Dagan's resolution of *Agins*. Given his emphasis on the need to protect groups "effectively excluded from actual participation in law-making," *id.* at 778, I expected him to argue that compensation should be required when a locality imposes the cost of open space on potential new residents who, as yet, lack a voice in local government.

45. 438 U.S. 104 (1978).

46. This seems to be Professor Dagan's characterization of *Penn Central*, but it is worth pointing out that *Penn Central* filed for bankruptcy on June 21, 1970. *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 902 (Regional Rail Reorg. Ct. 1974). Perhaps, under the circumstances, *Penn Central* should be considered a politically weak landowner unable to sustain the added financial burdens of the historic designation and therefore unable to survive the regulation long enough for the long-term reciprocal benefits to come into play. See Dagan, *supra* note 3, at 798-99 n.210.

47. Dagan, *supra* note 3, at 797-98.

48. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

In the case in which compensation is denied, the costs associated with refusing compensation would consist of Penn Central's expenditures in opposing or evading the restriction.⁴⁹ Although we cannot determine these opposition costs precisely *ex ante*, we do know that, depending on its perceived chance of success, Penn Central would rationally spend any amount up to the value of the lost development rights attempting to persuade the government not to adopt the restriction.⁵⁰ We also know that, even if initially unsuccessful in blocking the restriction, Penn Central will not stop there. Given that it retains formal title to the associated parcel, Penn Central will likely continue to press its case for abandoning or weakening the airspace development restriction whenever the opportunity arises. In that light, so long as the transaction costs of compensating were only a small fraction (five to ten percent) of the lost development value,⁵¹ Penn Central's continuing opposition expenditures will likely exceed, sooner or later, the one-time transaction costs entailed in awarding compensation. Moreover, we must also include as a component of the opposition costs the risk that Penn Central's efforts will eventually persuade the government to abandon the socially desirable preservation of the terminal. When we add this risk, the opposition costs that will arise from not compensating Penn Central almost certainly exceed the transaction costs of paying compensation. Because the costs of denying compensation are likely to exceed the costs of implementing compensation, we should compensate Penn Central for the restriction.

We can tell ourselves that Penn Central has no real basis for complaint and point to the reciprocal long-term benefits that it will receive from the property restriction. We can tell ourselves that Penn Central is behaving irresponsibly by refusing to accept its fair share of the community's burdens. But if our invocation of such high-minded ideals fails to persuade Penn Central to forego its opposition efforts, we are merely rationalizing our decision to impose the burden on Penn

49. We can only imagine that Penn Central's opposition would substantially increase if we denied compensation to Penn Central, but awarded it to other similarly situated, but less wealthy landowners. Also, if compensation is awarded but is less than complete, Penn Central would oppose the measure. But its reason for doing so — the lost development value — would be reduced by the compensation available.

50. Actually, in each instance in which Penn Central perceived an opportunity to persuade the government to allow development, Penn Central would rationally spend up to 100% of the lost development value on its persuasion efforts discounted by its perceived chance of success. Such opportunities might come up numerous times, so it is conceivable that Penn Central could eventually spend more than the lost development value on persuasion efforts. See Lunney, *supra* note 1, at 1947 n.238.

51. See Lunney, *supra* note 1, at 1957-59 (justifying the assumption of low transaction costs under a uniform few-many compensation rule); see also Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practice of Condemnation*, 67 COLUM. L. REV. 430, 440-43 (1967) (finding transaction costs in condemnation actions in the three to six percent range typically charged private purchasers or sellers of land by real estate agents).

Central⁵² and, not incidentally, increasing the overall cost of the desired public good.

However emotionally attractive it might seem to impose this cost on Penn Central, refusing to compensate Penn Central is likely to prove a less efficient means to the desired restriction. In addition, it will send a message to property owners more generally. It tells property owners that they cannot rely on the Compensation Clause to protect them against government-imposed restrictions. If they want protection, they will need to lobby the government to block, limit, or avoid such restrictions. While some of these owners will lose, as Penn Central did, all will fight bitterly to protect their rights.⁵³ As a result, refusing to compensate concentrated interest groups in the relatively few cases in which the government is able to act despite interest group opposition greatly increases the costs associated with the relatively many cases in which the government will prove unable to act. Thus, to the opposition costs of Penn Central above, we must add the cost of those government projects blocked by interest groups because of the *Penn Central* Court's refusal to require compensation. As a result, we stand to lose far more by refusing to compensate Penn Central than we stand to gain.

V. THE COMPENSATION CLAUSE: SEARCHING FOR PRINCIPLES

In the end, how we resolve the takings issue comes down to how we see citizens and the government responding to the compensation rules courts establish. Professor Michelman, for example, has suggested a compensation rule based upon a comparison of settlement and demoralization costs. This rule is driven by his assumptions regarding citizen and government responses.⁵⁴ First, Michelman assumes a reactive citizenry, which waits passively for, and then becomes demoralized by, uncompensated government-imposed takings.⁵⁵ Second,

52. As I have explained elsewhere, this process of blaming the victim is both part of the means of overcoming interest group opposition and part of the reason legislatures are not good at recognizing the need for compensation when it arises. Lunney, *supra* note 9, at 751-53. More generally, by setting up a high standard of civic virtue against which we measure Penn Central's conduct, Professor Dagan's argument leaves room to assert that Penn Central's conduct is wrongful, even harmful, which resonates with the harm-benefit approach to the takings issue. See Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 *FORDHAM ENVTL. L.J.* 433, 465 (1995).

53. A somewhat different analysis justifies a few-many rule for governments characterized by majoritarianism, rather than by interest group pluralism. See Lunney, *supra* note 9, at 750-56.

54. See Michelman, *supra* note 48, at 1214-15.

55. I interpret Professor Michelman's citizenry as reactive based upon his focus on demoralization costs. In addition, Professor Michelman's definition of demoralization costs — the disutilities and potential for lost future production "which accrue to losers and their sympathizers specifically from the realization that no compensation is offered" — implies a passive citizenry. *Id.*

he adopts a social choice view of the government, in which the government imposes burdens fairly and efficiently whether compensation is required or not.⁵⁶ Given these assumptions, the only costs affected by the choice between compensation rules are demoralization and settlement costs, and his test necessarily becomes a balancing of these two.

Yet, despite its continuing influence, Professor Michelman's original article vastly oversimplifies both citizen responses to takings and the relationship between compensation and the governmental decisionmaking process. Citizens are not likely to sit idly by as the government sorts out whose property to take. Governments, even in representative democracies, do not invariably act in the best interest of the public as a whole. Analysis of the takings issue therefore must account for the possibility of a proactive and opportunistic citizenry, which learns of planned government impositions, lobbies the government to block the imposition or shift it elsewhere, and uses the government to extract unpaid-for property transfers. Such an analysis must also incorporate a more realistic account of governmental decisionmaking, in which interest groups or majoritarian impulses can lead the government astray. Indeed, the Compensation Clause makes sense as a constitutional requirement only if we do not trust the legislature to recognize the need for compensation and to provide it when appropriate.⁵⁷ In the light of these complexities, compensation becomes a tool, not just to recompense deserving individuals for government-imposed burdens but, more importantly, to improve an otherwise problematic governmental decisionmaking process.⁵⁸

In line with these latter approaches, Professor Dagan interjects into this debate a timely reminder that present takings doctrine, as well as the realities of political power, creates a very real risk that the government presently imposes undue burdens on the politically powerless in land use decisions. The notion that we might solve this prob-

56. Professor Michelman's adoption of a social choice view of government is reflected in his statement: "It follows that if, for any measure, both demoralization and settlement costs (whichever were chosen) would exceed efficiency gains, the measure is to be rejected" *Id.* at 1215. Although Professor Michelman does not say whether the courts or the legislature is supposed to reject such measures, his compensation rule does not require compensation in such cases, and therefore it apparently leaves to the legislature the task of recognizing and rejecting such undesirable measures. *Id.* ("[C]ompensation is due whenever demoralization costs exceed settlement costs, and not otherwise."). Moreover, nowhere in his utilitarian calculus does Professor Michelman formally account for how a compensation requirement might influence government decisionmaking. He simply proposes comparing demoralization costs and settlement costs without any further consideration of how such a comparison might affect a decision to take property and, if so, which property to take.

57. See Lunney, *supra* note 1, at 1949.

58. Others have expressed variations on this theme. See, e.g., Sax, *supra* note 25, at 62-63 (identifying government decisionmaking as potentially problematic when the government acts as an enterprise and suggesting that compensation should therefore be required in such cases).

lem by an increased willingness to compensate the politically powerless and a decreased willingness to compensate the politically powerful has initial appeal. But closer examination suggests that a uniform few-many test, together with something closer to "true loss" compensation awards, would achieve the same distributive justice goals if funded through progressive taxation. In addition, it would prove better able to overcome the efficiency concerns associated with takings.

As for the normative influence of law, Professor Dagan's theory of law as teacher has a long tradition. History suggests, however, that we should neither overstate the law's capacity to shape individuals nor assume too readily that the government will exercise this capacity in a benign fashion. Within limits, the law can effectively require individuals to behave in certain ways, but it does so through the threat, or actual use, of force. And it is simply unclear what moral values are served by forcing Penn Central and Agins to turn over their property without compensation, as Professor Dagan advocates.

Professor Duncan Kennedy's assertion that the fundamental tension in the law is between other and self, between altruism and selfishness, suffers from a similar misapprehension.⁵⁹ The decision to sacrifice self-interest for the sake of another, which Professor Kennedy defines as altruism and Professor Dagan defines as social responsibility, lies at the heart of individual morality, not the law. Law must navigate between allowing an individual to choose for herself and making the choice for her. When the law intervenes in an individual's life by imposing or threatening sanctions for selfish choices, the resulting outcomes may be indistinguishable from the choices a free, moral individual would make. The law obtains these outcomes, however, not by encouraging altruistic values or social responsibility but by appealing to the individual's selfish desire to avoid the law's sanction. Thus, legal intervention converts what would have been a choice between self-regarding behavior and other-regarding behavior into a choice between competing self interests. To be sure, if the law allows the individual to choose, it necessarily entails the risk that she may choose wrongly (e.g., by privileging self over other). But if we do not allow the individual to choose, then we have necessarily eliminated the individual's capacity to choose correctly. As a result, relying on the law to ensure proper conduct may weaken, rather than foster, an individual's capacity for moral choice when the law's sanction is removed.

Social responsibility and civic virtue are, without debate, desirable in any community. But these, like all virtues, come from within and cannot be forced by legal rules. If we refuse to compensate Penn Central or if we force a freeway through Beverly Hills over the residents' objections, we can thereby compel these landowners to give up their

59. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685-86 (1976)

property, subject to the penalty of the law, for the sake of the community. But we should not make the mistake of thinking that we have thereby made those landowners more virtuous or more responsible. We have simply set the stage for them to make absolutely certain that someone else will have the pleasure of experiencing “civic virtue” the next time.